No. 83-1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IOWA POWER & LIGHT COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Pursuant to Rule 22.5 of the Rules of this Court, petitioner Iowa Power and Light Company submits this reply brief responding to the arguments first raised in the briefs in opposition.

REPLY ARGUMENT

The respondents, like the court of appeals, fail to grasp the broad scope of the statutory requirement that the effective tariffs be strictly observed. The court of appeals

focused improperly on the need to prevent rebates. But that is only part of the purpose of the statute, as may be seen by reference to the antecedents of the present version of §10761(a). As this Court said in *Pennsylvania R. Co. v. International Coal Co.*, 230 U.S. 184, 196-97 (1913), it is just as much contrary to the statutory tariff regime for a carrier to seek to apply retroactively rates above the tariff rates in effect when the transportation takes place as it is for the shipper to seek rates below the tariff level. The broad scope of this requirement can be readily understood by reference to the relevant language of the statute before its recodification:

> No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a *greater or less* or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and *in effect at the time;* nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. Feb. 4, 1887, c. 104, Pt. I, § 6, 24 Stat. 380; Mar. 2, 1889, c. 382, § a, 25 Stat. 855; June 29, 1906, c. 3591, § 2, 34 Stat. 586; Feb. 28, 1920, c. 91, § 411, 41 Stat. 483; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

49 U.S.C.A. § 6(7) (1959) [emphasis added]. The requirement for strict observance of the tariff "in effect at the time" is set apart by a semi-colon from the portion of the statute prohibiting rebates. Thus, it is obvious that the Congress intended to prohibit railroads (and other carriers) from charging either *more than* or less than the tariff rate in effect at the time the transportation service is provided.[1] It is just as unlawful for a carrier to practice a discrimination *against* a shipper by seeking afterwards to charge a higher rate than that specified in the effective tariff as it is for the carrier to practice a discrimination *in favor of* a shipper by allowing him to obtain a lower rate than that specified in the effective tariff.[2] Contrary to

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[1]Any doubts about the scope of the statutory language must be resolved by reference to the provisions before modification (Pub. L. 95-473, 92 Stat. 1337), which was intended to revise and recodify the Interstate Commerce Act "without substantive change." *Water Transport Association v. I.C.C.*, 715 F.2d 581, 590 (D.C. Cir. 1983), cert. den. ____ U.S. ____, 104 S. Ct. 998 (1984), and *Shippers Nat'l Freight Claim Council v. I.C.C.*, 712 F.2d 740, 742, n. 2 (2d. Cir., 1983).

[2]See *Interstate Grain Co. v. Chicago & N.W. Ry. Co.*, 22 I.C.C. 34, 35 (1911) (". . . under the act to regulate commerce it is as unlawful for a carrier to overcharge a shipper as to give him a rebate."); *Refrigerator and Butcher Supply Co. v. Illinois Cent. R. Co.*, 20 I.C.C. 64, 65 (1910) ("It is the plain duty of the carriers to collect no more than the published rate; to do otherwise is a crime for which indictment will lie and for which there is serious punishment provided in the law against both the carrier and its agent."); *Tyson and Jones Buggy Co. v. Aberdeen & A. Ry. Co.*, 17 I.C.C. 330, 332 (1909) (". . . the retention by a carrier of an overcharge not only has all the effects of an unjust discrimination against the shipper from whom the excess has been demanded, but leaves the transportation transaction in an unlawful condition, both under the act to regulate commerce and the Elkins Act. . .") and *Phelps & Co. v. Texas & P. Ry. Co.*, 6 I.C.C. 36, 50 (1893) (". . . the retention of an overcharge has all the effect of unjust discrimination against the person from whom payment has been required. . . .").

respondents' assertions (Federal respondents brief p. 6; BN brief, p. 11), Iowa Power is seeking protection from the discriminatory application of retroactive rates.

The court of appeals and the I.C.C. both failed to recognize the scope of the statutory requirement that tariffs be strictly observed. In that regard, the actions below are unprecedented, and are of significant importance, not just because of their substantial impact on petitioner Iowa Power,[3] but because of the significance of the potential of using retroactive tariffs in all federal regulatory statutes which utilize a tariff regime.[4]

Respondents continue to argue, as they did below, that this Court's decision in *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965) carves out an exception to the general rule that the filed tariff in effect at

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[3]The suggestion in the Federal respondents' brief (pp. 5-6) that the issue may be irrelevant to Iowa Power (a contention not echoed by respondent Burlington Northern) is plainly wrong. As stated at page 4 of the petition, BN takes the position that the refund award in the contract litigation would apply to only a portion of the retroactive charges collected, leaving $3,901,359.88 at issue. Of course, if BN pursues its appeal from the district court (docketed as No. 84-1292-JI in the U.S. Court of Appeals for the Eighth Circuit) and prevails, then the entire amount of the retroactive charges collected ($9,067,065.26) is at issue.

[4]Provisions requiring filing and observance of tariffs are found in the Natural Gas Act (15 U.S.C. §717c(c)), the Federal Power Act (16 U.S.C. §824d(c)), the Federal Communications Act (47 U.S.C. §203(c)), the Shipping Act of 1916 (46 U.S.C. §817), as amended, and the Packers and Stockyards Act (7 U.S.C. §207(f)). Of course, the provisions at issue here also apply to non-railroad transportation carriers (motor carriers, water carriers and freight forwarders), and the provisions of the Interstate Commerce Act before recodification still apply to oil pipelines. (See Sec. 4(c), Pub. L. 95-473, 92 Stat. 1470 (1978)). Respondents have cited no cases in which a retroactive tariff has been permitted under these provisions.

the time the service is provided must be strictly observed. They base this argument on the view, contrary to this Court's decision in *Southern Pacific Co. v. I.C.C.*, 219 U.S. 433, 442-444, 451-452 (1911), that the I.C.C. may exercise equity power in the administration of the Interstate Commerce Act.

This case must be distinguished from those cases relied on by respondents where the courts may exercise their own equity powers to restore situations created by prior exercise of equity jurisdiction by the courts.[5] Even in those situations, the statutory provisions of the Act can be a limitation on the exercise of the general equity authority by the courts. *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 311-317 (1935).[6]

Nearly all of the other cases cited by respondents for the proposition that an agency may correct its own errors did not involve tariffs.[7] But the one case which did involve

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[5]E.g., *United States v. Morgan*, 307 U.S. 183, 197 (1939), quoting *Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 146 (1919) ("inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done *by virtue of its process.*" [emphasis added]) To the same effect are *Inland Steel Co. v. United States*, 306 U.S. 153 (1939) and *Middlewest Motor Freight Bureau v. U.S.*, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

[6]In a case relied on by respondent BN (brief, pp. 12 and 15), *Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336, 344-348 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975), the court specifically modified its decree to avoid imposing retroactive liability on the utility's customers.

[7]Cases such as those cited by respondent BN (brief, p. 16) involved licenses for hydroelectric dams (*Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 203 (4th Cir. 1967), *cert. denied*, 390 U.S. 495 (1968)) contracts or contract rates (*Papago Tribal Utility Authority v. FERC*, 723 F.2d 950, 950 (D.C. Cir. 1983), *Southern Ry. Co. v.*

(continued)

tariffs (*Moss v. C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 966 (1976)) was not presented with the question of whether a retroactive tariff would be permissible.[8]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[7](continued)
United States, 412 F. Supp. 1122, 1127 (D.D.C. 1976)), certificates with conditions (*Plaquemines Oil and Gas Co. v. FPC*, 450 F.2d 1334, 1335 (D.C. Cir. 1971) and *Skelly Oil Co. v. FPC*, 401 F.2d 726, 727 (10th Cir. 1968)), or direct regulation (without tariffs) of oil prices (*Taunton Mun. Light. Plant v. DOE*, 669 F.2d 710, 711 (Temp. Em. Ct. of App. 1982)).

[8]While denying, on the authority of *T.I.M.E Inc. v. U.S.*, 359 U.S. 464 (1959) [relied on by petitioners], any right of the CAB to award reparations the court did seem to suggest that, if a rate was shown to be unreasonable, that a *court* could later award restitution. 521 F.2d at 307, n. 19.